New Mexico Symphony Orchestra, Inc. *and* Muscians Association of Albuquerque, Local 618, American Federation of Muscians, AFL–CIO. Case 28–CA–13596

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

The issue presented in this case is whether the Respondent, New Mexico Symphony Orchestra, Inc., violated Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally changing the terms and conditions of unit employees by failing and refusing to make timely and full payroll payments. Based on the parties' stipulation of facts, we find that the Respondent violated the Act as alleged.

Procedural History

The Union filed an unfair labor practice charge on March 11, 1996. By letter dated April 30, 1996, the Regional Director for Region 28 deferred the dispute to the parties' grievance and arbitration procedures under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). By letter dated February 27, 1997, the Regional Director revoked the deferral of the charge and reopened the investigation. Thereafter, on March 31, 1997, the Regional Director issued a complaint and notice of hearing. The Respondent filed a timely answer, admitting in part and denying in part the allegations in the complaint. In particular, the Respondent denied that it had engaged in unfair labor practices.

On January 22, 1998, the General Counsel, the Respondent, and the Charging Party filed a stipulation of facts and a joint motion to transfer proceedings directly to the Board. The parties agreed that the charge, the letter from the Regional Director approving the partial withdrawal of the charge, the answer, and the stipulation of facts with attachments would constitute the entire record before the Board. The parties waived a hearing, the making of findings of fact and conclusions of law by an administrative law judge, and agreed to submit this case directly to the Board for findings of fact, conclusions of law, and a Decision and Order.

On March 19, 1998, the Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the Respondent filed a motion to dismiss the complaint and a supporting brief and the General Counsel filed a brief. The Charging Party filed an answering brief to the Respondent's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New Mexico corporation, incorporated as a domestic, nonprofit corporation, maintains a principal place of business in Albuquerque, New Mexico. At all material times, the Respondent has engaged in business as a symphony orchestra. During the 12-month period preceding the execution of the stipulation, the Respondent derived gross revenues in excess of $1 million exclusive of contributions that, because of limitations by grantors, are not available for use for operating expenses. During the same period, the Respondent purchased goods valued in excess of $50,000 from suppliers located within the State of New Mexico which purchased and received such goods and materials directly from points outside the State of New Mexico.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

Since 1993, the Respondent and the Union have been parties to a series of collective-bargaining agreements covering a unit of the Respondent's employees consisting of all the musicians in the orchestra. Under Article 13 of the contract,[1] unit members are paid the total of their personal service agreement in 20 equal payments, made twice monthly, over a 10-month period. Unit members also have the option of electing to be paid in 24 equal payments, made twice monthly, over a 12-month period. In either case, the contract requires that the Respondent make wage payments twice monthly on the 15th and 30th/31st day of each month. During the 6 months preceding the filing of the charge, from September 11, 1995 to March 11, 1996, the Respondent, with few exceptions, failed to make payroll or was late or behind in making part or all of its payroll obligations to unit employees. During this period, the Respondent was,

[1]The most recent contract was effective by its terms from September 1, 1995 to August 31, 1996. On March 31, 1997, the date on which the charge was filed, the parties were operating under a 1-year extension of the contract, which was effective by its terms through August 31, 1997.

at times, up to two payments behind in making the contractually required wage payments. Continuing though March 31, 1997, the date on which the complaint issued, the Respondent was chronically late in making full contractual wage payments. On each occasion that the Respondent failed to make the contractually required payroll payments, the failure was due to a lack of sufficient funds to cover operating expenses.

The contract contains a grievance and arbitration clause providing for binding arbitration.[2] Each time the Respondent failed to timely make the payroll payment, the Union filed a grievance. In response to each grievance, the Respondent admitted that it had failed to comply with the terms of the contract by either failing to make the contractually required wage payment or making the payment late as alleged in the grievance. In some of its responses, the Respondent would indicate either the date on which the delinquent payroll was paid and declare that the grievance was satisfied[3] or predict the date on which the payment would be made.[4] In other responses, the Respondent would warn of another impending failure to make payroll or indicate its "hope" that employees would be paid "as soon as possible."[5]

By letter dated November 1, 1995, the Union's president informed the Respondent that "it is the Union's position that no musician is obliged to work when payrolls are not being met in full and in a timely manner" and that no musician "may be properly disciplined or discharged for making the decision that he or she will not work" as long as the payroll was not being met. By letter dated November 8, 1995, the Respondent's executive director Paul Bunker admitted its failure to make timely payment on "a number of payrolls," but noted that the contractual grievance and arbitration procedure is the exclusive mechanism for resolving disputes under the contract. Bunker also noted that the no-strike clause prevents the Union and unit employees from striking to protest the late payments.

The Union did not elect to take any of the grievances to arbitration. As of the date of the stipulation, the Respondent had paid unit employees all the back wages due them and its payroll was current.

[2]Art. 22.2 requires that disputes or disagreements "arising out of or in any way involving the interpretation or application of [the contract]" be submitted to the arbitration procedures. Art. 22.8 provides that the arbitrator "shall limit his or her decision strictly to an interpretation of the language of [the contract]."

[3]Letters dated November 28, December 10, 1995, and January 17, 1996.

[4]Letters dated November 13, 1995, February 22, and March 5, 1996.

[5]Letters dated November 13, 1995, January 18, and February 22, 1996.

B. The Parties' Contentions

The General Counsel contends that the Respondent's repeated and habitual failure to pay employees in accordance with the terms of the contract is a unilateral change in the existing wage structure and violates Section 8(a)(1) and (5) of the Act. The General Counsel further contends that deferral to arbitration is inappropriate, noting that the Union's resort to the contractual grievance and arbitration procedure is and has been futile, and that a determination by the Board of the merits of the alleged unfair labor practice is critical to the assessment of the unit employees' right to engage in a work stoppage or other actions protected by Section 7.

The Respondent argues that the Regional Director erred in revoking the deferral of this case and that the Board should dismiss the complaint. The Respondent further argues that the parties' contract places the burden of initiating arbitration on the aggrieved party and that the Union has consistently failed to submit its grievances to arbitration. Finally, the Respondent admits that it failed to make the required payroll payments but contends that it lacked sufficient funds to cover operating expenses and its inability to make all of its payrolls in a timely manner is an unintended and unavoidable breach of the contract.

The Charging Party argues that deferral is inappropriate because the Respondent has admitted that it did not comply with the contract and therefore interpretation or application of the contract is not in dispute.

C. Discussion

It is well established that the failure to make timely contractually required payments without consent of the Union constitutes a unilateral modification of the terms of the collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act. See, *R.T. Jones Lumber Co.*, 313 NLRB 726 (1994), and cases cited therein. In the instant case, Article 13.13 of the parties' contract requires the Respondent to make wage payments on the 15th and 30th/31st day of each month and the Respondent has admitted that it has not complied with the contract.

We find no merit in the Respondent's assertion that deferral to arbitration is appropriate.[6] In the instant case, the admitted breach of the contract does not involve a question of contract interpretation or require the special competence of an arbitrator. *R.T. Jones Lumber Co.*, supra at 727. Article 13.13 of the parties' contract is clear and unambiguous on its face and the Respondent admits that it failed to make the contractually required

[6]Accordingly, we dismiss the Respondent's motion to dismiss.

wage payments. The Respondent does not assert that the contract gives it the right unilaterally to alter the timing and amount of wage payments. No construction of the contract is relevant for evaluating the only reason asserted by the Respondent for failing to make its payroll, namely the lack of sufficient funds to cover operating expenses.[7]

We also reject the Respondent's assertion that this case involves only "an unintended and unavoidable breach" of the contract. It is well settled that the Respondent's assertion that it lacked sufficient funds to cover its operating expenses is not an adequate defense to an allegation that it has unlawfully failed to abide by the provisions of its collective-bargaining agreement. *Stevens & Associates Construction Co.*, 307 NLRB 1403 (1992). Further, the Board has recognized that wage provisions are "perhaps the most important element of the many in the employment relationship which Congress remitted to the mandatory process of collective bargaining under the Act." *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). Thus, the Board's jurisdiction under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective bargaining against conduct so disruptive to one of its principal functions—the establishment and maintenance of a viable agreement on wages.[8]

Here the Respondent admits that it has consistently failed to make timely and full wage payments. For example, as noted above, during the 6 months preceding the filing of the charge, the Respondent, with few exceptions, failed to make or was late in making part or all of its bimonthly payroll obligations. The parties also stipulated that, throughout the term of the collective-bargaining agreement and continuing through March 31, 1997, the date the complaint issued, the Respondent was chronically late in making full contractual wage payments. In these circumstances, the Respondent's conduct is more than a de minimis failure to abide by the contractually mandated terms and conditions of employment. *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991).[9]

Accordingly, in view of the Respondent's admitted failure to make timely and full payroll payments, we find that the Respondent has violated Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By failing and refusing to make timely and full payroll payments, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make the unit employees whole for any losses they may have suffered as a result of the Respondent's unlawful failure to make timely and full payroll payments, with such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[10]

ORDER

The National Labor Relations Board orders that the Respondent, New Mexico Symphony Orchestra, Inc.,

[7] Although stating that he does not reach the deferral issue, our dissenting colleague suggests that the contractual grievance and arbitration procedure may adequately redress the Respondent's failure to make timely and full wage payments. However, the Union filed a grievance each time the Respondent failed to make timely payroll and, in many instances, the Respondent negated the grievance by making a late payment. Despite these grievances, the Respondent continued to be chronically late in making full contractual wage payments. Only after repeated failure to gain redress through the grievance and arbitration mechanism did the Union come to the Board. To be sure, the Union's grievances were successful in securing payment of the delinquent payroll. The grievances did not, however, end the Respondent's chronic lateness in making contractually required payroll payments.

[8] Id. The possibility that other remedies exist as suggested by our dissenting colleague does not displace the Board's authority to adjudicate and remedy an unfair labor practice. Sec. 10(a) of the Act provides that the Board's authority to prevent unfair labor practices is "not affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ." The Board is not trespassing on forbidden territory when it inquires whether negotiations have produced a bargain which an employer refuses to honor. The proper business of the Board is to remedy conduct, such as that in the instant case, that amounts to the repudiation of an obligation under the collective-bargaining relationship.

Our dissenting colleague also suggests that the Respondent might not make a timely wage payment pursuant to our Order. We are unwilling to assume that the Respondent will fail to comply with the Board's Order once it is enforced. Further, we are confident that if the Respondent does not comply, the courts will take appropriate action.

[9] In finding no violation, our dissenting colleague cites his own prior dissenting opinion in another case, as well as the dissenting opinions of other Board Members in *Zimmerman* and other cases, thereby effectively conceding that his position is contrary to Board precedent. Our dissenting colleague further suggests that the collective-bargaining process can provide adequate redress for the Respondent's misconduct. However, a similar contention was also rejected in *Zimmerman*, 302 NLRB at 857, and we likewise reject our colleague's suggestion here.

[10] The parties have stipulated that, as of the date of the stipulation, the Respondent had paid unit employees all back wages due them and that its payroll is current. To the extent the Respondent has made the contractually required wage payments, those amounts shall be deducted from any backpay that may be due.

Albuquerque, New Mexico, its officers, agents, successors, assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union, by failing and refusing to make timely and full payroll payments to unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make timely and full payroll payments as required by the collective-bargaining agreement and make whole unit employees for any losses they may have suffered as a result of the Respondent's unlawful failure to make timely and full payroll payments, in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payment due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 11, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2001

John C. Truesdale, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HURTGEN, dissenting.

My colleagues find that the Respondent violated Section 8(a)(5) and (1) by failing to pay its unit employees in a timely fashion, as required under its collective-bargaining agreement with the Union.[1] In so doing, they reject the Respondent's arguments that its failure, on various occasions, to pay its employees on time was an unintended contract breach caused by insufficient funds, and was not a violation of the Act. Alternatively, they reject the Respondent's argument that such a contract breach should be deferred to the parties' grievance-arbitration procedure.

I disagree with my colleagues. I find that the tardiness of Respondent's payments was not unlawful under Section 8(a)(5). The parties stipulated that the tardiness was "occasioned by a lack of sufficient funds to cover operating expenses and for no other reason." The issue is whether the Respondent has terminated or modified the contract in violation of Sections 8(a)(5) and 8(d), as distinguished from committing a contract breach. Clearly, Respondent has not engaged in the former conduct. It has not repudiated the contract or sought to avoid its terms. It simply has been financially unable to pay at various times. At most, this is a breach of contract, not a violation of Sections 8(a)(5) and 8(d) of the Act.[2]

I disagree with my colleagues' conclusion that the contractual grievance and arbitration procedure has been inadequate to deal with contract breaches. My colleagues say that Respondent's subsequent wage payments have "negated" the grievances. In fact, those grievances prompted Respondent to tender the payments or provide written explanations as to when payments would be made. The Union had the option of accepting this as a settlement *or* pursuing the grievance further.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Although several paychecks were not provided to employees on time, all pay owing to the employees had been tendered at the time that the parties presented this case to the Board on a stipulated record.

[2] See my dissenting position in *Endicott Forging & Mfg.*, 328 NLRB No. 15, slip op. at 3 (1999).

Those grievances—if pursued—would provide the Union with the opportunity to recoup from the Respondent any additional moneys or other applicable remedies or penalties provided for under the contract and much more expeditiously than any relief the Board will provide. The Union, as the aggrieved party, had the right to pursue these grievances to arbitration. It chose not to do so.

In sum, the fact that there is no 8(a)(5) violation here does not mean that there are no ways to redress the problem. There is a grievance-arbitration mechanism; there is Section 301 of the Act to enforce arbitral awards; and there can be collective bargaining to find ways to redress the problem. With particular respect to collective bargaining, for example, the Union and the Respondent could agree to a bond that would be the source of prompt payment of wages if the Respondent did not pay in a timely fashion.

The majority implies that I have found the Respondent's failure to make timely wage payments to be "de minimus." They misconstrue my position. I do not minimize the importance to employees of receiving timely pay. Nor do I seek to diminish the Respondent's contractual obligation to make those payments. However, the late payments here were unintended and were driven solely by lack of funding. The Respondent has demonstrated its ongoing willingness to work with the Union to redress the problem of late payments. The Respondent is willing to apply the contractual grievance-arbitration mechanisms to its breach. In these circumstances, I find that the dispute is best resolved in that manner rather than through Section 8(a)(5).

My colleagues misconstrue my position in another respect as well. I am not saying that the Board lacks the *power* to redress unfair labor practices. Clearly, under Section 10(a) the Board has the power do so. However, as discussed infra, I do not believe that there has been Sections 8(d) and 8(a)(5) contract modification. Further, even if there were, the Board has *discretion* to allow other tribunals to resolve the dispute (e.g., *Collyer* deferral).

Finally, I stress that there is no need to turn this dispute into a full-blown NLRB case. The Board is a busy agency, with many cases on its plate. I see no need to spend time and money (taxpayer and party money) on a case such as this one. Even if successful, 8(a)(5) litigation will not solve the problem. After extended litigation (ALJD, Board decision, court decree), this case will result only in an order that Respondent make timely payments. Let us assume arguendo that the conduct is repeated, i.e., Respondent, for financial reasons, is unable to make a timely payment. I suggest that a court would not find it "clear and convincing" that Respondent should be held in contempt. The practice of punishing debtors ended in this country in the 19th Century. Thus, one wonders why all the time and money has been spent on the litigation of the instant case.[3] I therefore would dismiss the complaint.[4]

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Musicians Association of Albuquerque, Local 648, American Federation of Musicians, AFL-CIO, the exclusive collective-bargaining representative of our employees in an appropriate unit, by failing and refusing to make timely and full payroll payments. The appropriate unit is:

> All employees employed by the New Mexico Symphony Orchestra, Inc. performing work covered by the classifications set forth in Article 2 of the collective-bargaining agreement, but excluding guards and supervisors as defined by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[3] Contrary to my colleague's assertion, I am not suggesting that the Respondent would disobey a Board order. I simply suggest that *even if* Respondent is financially unable to comply, contempt sanctions would be unlikely.

[4] In an otherwise meritorious case, the Board may defer under *Collyer*. In a case without merit, the Board dismisses.

WE WILL make timely and full payroll payments as required by the collective-bargaining agreement and WE WILL make whole unit employees for any losses they may have suffered as a result of the our failure to make timely and full payroll payments, with interest.

NEW MEXICO SYMPHONY ORCHESTRA, INC.